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IN THE

Supreme Court of the United States

October Term, 1957.

No. 9

HOWARD LAWN,

Petitioner,

—vs.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR REHEARING

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Petition For Rehearing

Petitioner Lawn respectfully requests that the Court reconsider its judgment in *Lawn v. United States*, No. 9, O. T. 1957, January 13, 1958, for the following reasons:

1. The petitioner was denied relief on his claim that unconstitutionally secured evidence was illegally used against him on the basis of an implied waiver which, on re-examination, the Court must see could not have occurred.

The theory of the waiver asserted by the Court in its opinion was one which was not suggested, argued, or briefed by counsel on either side. Indeed, the waiver found by the Court to have existed contradicts the theory proffered to the Court by the Solicitor General.

2. The petitioner was denied relief on his claim of prejudice resulting from highly improper summation by the prosecutor, in part, on the basis of an error of fact which is demonstrable from the record.

I.

We respectfully suggest to the Court that it has created a precedent of broader implications than it might have appreciated. For the Court holds that where several possible interpretations might be made of a defendant's action, that interpretation of the facts will be assumed to be the proper one which may be read as a waiver of defendant's constitutional rights, despite the fact that such waiver is inconsistent with all of defendant's patient and exhaustive efforts both to avoid such waiver and to assert the rights which are afforded him by the Constitution.

A. The alternative constructions of Mr. Stryker's conduct.

In the context of the case, the following constructions of the action of Mr. Stryker, are reasonable alternatives:

1. It is reasonable to assume that Mr. Stryker did not appreciate the fact that tainted evidence was being used. This would not constitute a waiver of defendant's constitutional rights.

2. It is reasonable to assume that Mr. Stryker believed that the evidence originated from an innocent source, legally available to the prosecutor. This would not constitute a waiver of defendant's constitutional rights.

3. It is reasonable to assume that Mr. Stryker relied on the lulling assurances from the United States Attorney that no illegally obtained evidence would be used. This would not constitute a waiver of defendant's constitutional rights.

4. It is reasonable to assume that the proper interpretation is that of the Solicitor-General, that Mr. Stryker erroneously relied on the possibility that Judge Goddard had not ordered the documents in question returned to the defendant. This would not constitute a waiver of defendant's constitutional rights.

5. It is reasonable to assume that Mr. Stryker tried the case so as to serve the interests of all the clients whom he represented and not to advantage Lawn at the expense of Giglio and Livorsi. This required Mr. Stryker to hold fast to the bar against use of tainted evidence. This would not constitute a waiver of defendant's constitutional rights. We propose to amplify the force of this interpretation in our next point.

6. It is reasonable to assume — we are told by the Court — that Mr. Stryker, having spent years asserting the unconstitutional invasions of his client's interests, gave up Lawn's constitutional rights in order to secure an opportunity to drive home to the jury a point (which the evidence could not prove and which counsel was precluded from making because of the conflicting interests of his clients). We propose to examine the force of the Court's interpretation in our next point. Assuming its validity, however, it is but one of the several possible alternatives and the only one of all of them on which the Court can base a theory of waiver.

B. Mr. Stryker did not intend to choose and serve one of two conflicting interests.

The Court has imputed to Mr. Stryker the purpose to prove that the check was an innocent loan and not an incriminating legal fee. To serve this purpose, Mr. Stryker is found to have consciously and intentionally lifted the absolute bar which Lawn held against the use of tainted evidence.

The necessary corollary of this Court's construction of Mr. Stryker's purpose is that he chose and intended to serve

one of two conflicting interests which he was representing, viz., to further the interest of Lawn at the expense of Giglio and Livorsi.

It was to the interest of Giglio and Livorsi to establish that the $15,000 was a legal fee and therefore a deductible expense on the part of Tavern. This $15,000 would then diminish the income of Tavern which was chargeable to Giglio and Livorsi, and this would tend to prove absence of tax deficiency on the part of Giglio and Livorsi.

To the contrary, if the $15,000 was a loan, then it was not deductible by Tavern.

The Court's construction thus necessarily imputes to Mr. Stryker a conscious purpose to jettison Giglio and Livorsi to protect Lawn. This premise is inadmissible here and effectively negates the imputed waiver. See *Glasser* v. *U. S.*, 315 U. S. 60, 75-6 (1942); *Jenkins* v. *U. S.*, 249 F. 2d 105 (9 C. Cir. 1957).

On the Court's construction, Mr. Stryker was faced with a fundamental dilemma how to proceed because the Court imputes to him an awareness of the tainted character of the proof; the dilemma was the conflicting interests of his clients. "In short, he [Stryker] had no meaningful choice." *Green* v. *United States*, 355 U. S. , 2 L. ed. 2d 199, 206 (1957).

An intention to preserve the bar against tainted evidence involved no dilemma for Mr. Stryker and such an intention is the only one which served and is consistent with the interests of all the clients of Mr. Stryker. He made this intent clear when he said:

> "I want to * * * make sure that I don't overlook any constitutional rights that are involved." (R. 1355).

C. The Court's theory that Mr. Stryker was using an opportunity fails on analysis.

The assumption that Mr. Stryker was seizing his only opportunity to prove that this was an innocent loan and not an incriminating legal fee fails on analysis. The introduction of the check might make it necessary for Lawn to give an

explanation of its purpose. The exclusion of the check called for no explanation. The check served only a Government purpose and nothing about it could help Lawn's defense in this case. The purpose of the check could not be constructed from the face of the paper since this gave no clue to the purpose of the payment. The questions which Mr. Stryker addressed to the witness Roth preliminary to the receipt of the check in evidence gave no indication nor did any answer thereto indicate that a loan and not a legal fee was represented by the check. It is impossible to point to any language in this preliminary examination which indicates conscious purpose to stamp the check as a loan and not a fee, or vice versa. To prove this point we set out every question and answer and a re-examination thereof will show that none contains any language suggesting the purpose for the payment.

"*Preliminary Questions by Mr. Stryker:*

Q. In whose handwriting are the entries on Government's Exhibit 61-B for identification? I think you said it is the stub book. A. To the best of my recollection, those are Mr. Cerone.

Q. How do you spell Cerone? A. Cerone.

Q. He was one of your employees, Mr. Roth? A. No, he was a bookkeeper employed by Tavern Fruit Juice.

Q. Would the same be true with regard to the check, the face of the check, payee of the check? A. The payee of the check and the amount?

Q. The handwriting is what I am asking about. A. The handwriting, that looks like William Giglio's handwriting.

Q. The maker of the check and the $15,000? A. Yes, the signature.

Q. They look like his handwriting, do they? A. Yes, sir.

Q. And this 61-B for identification, you have told me that that looked like the printing or the writing of Mr. Cerone, did you not? A. Yes, sir.

Q. And under that check stub or in that No. 640, which corresponds with the check itself, there is a parenthetical statement "Bill G"? A. Yes, sir.

Q. Indicating it is for Mr. Giglio's account? A. Yes, sir.

Mr. Stryker: No objection.
Mr. Wessel: I have just one question.

By Mr. Wessel:

Q. Mr. Roth, would you identify Mr. Cerone a little more fully, please? A. You mean by physical description?
Q. What is his full name? A. I think it was Anthony.

(Government's Exhibits 61-A and 61-B for identification received in evidence.)" (R. 1022-23).

Significantly, during the especially long general cross-examination of the witness Roth, Mr. Stryker did not even advert to the subject of loan versus fee. If he had any intent on the trial to drive home to the jury the purpose for the check, the time to do so was during the wide open cross-examination of Roth who admittedly mislabeled the purpose of the payment in the first place. The preliminary examination which was limited in scope was no place for Mr. Stryker to prove this point and his conceded experience precludes imputing to him an inopportune procedure.

D. Awareness of the taint cannot be spelled from the preliminary examination or other conduct of Mr. Stryker.

The questions which Mr. Stryker addressed to the witness Roth preliminary to the admission of the papers in evidence give no indication of the state of his awareness of the source of the evidence.

On the other hand, the record makes plain that at no time during the trial did Mr. Stryker have any notion whatsoever that Exhibits 61A-B were the outlawed documents whose use had been proscribed. The trial Judge virtually offered Mr. Stryker the hearing that he had been recurrently demanding if Mr. Stryker would only point to some use on the trial of tainted evidence.

> "The Court: * * * is there anything in this trial before this jury that has been improperly obtained? * * *.
>
> "Mr. Stryker: The point was really that we were not able to find out whether those things were improperly obtained or not." (R. 2077; also, R. 1957-9).

If it is true that Mr. Stryker realized the taint of Exhibits 61A-B and of the oral testimony of the witness Roth which was derived from and preceded the introduction of the exhibits, Mr. Stryker had a hearing within his grasp and the inference is inescapable that he would have pointed out this tainted proof to the Judge.

The Solicitor General underscores Mr. Stryker's unawareness of the tainted proof thus:

> "One can surmise that the reason no memorandum [of use of tainted evidence] was submitted was that defense counsel was unable to find in the record any item of evidence which 'could have been developed'". (Br. No. 10 p. 32 fn. 14)

We respectfully point out that on the score of Mr. Stryker's awareness, this Court's opinion is internally inconsistent. In the closing paragraph of Section I of the opinion, at page 10, the Court states:

> "We deal here only with the question whether petitioners, in the circumstances of this case, were entitled to a preliminary hearing to enable them to satisfy their *unsupported suspicions* whether the 1953 grand jury that returned the indictment made any direct or derivative use of the materials which they produced before the 1952 grand jury. We hold they were not." (Emphasis supplied.)

Is it not true that if, as the Court later states, Mr. Stryker is to be charged with knowledge that evidence illegally secured before the 1952 grand jury was used on the trial, his "suspicions" during the trial that this tainted evidence was used before the 1953 grand jury would not be "unsupported" if during the trial he was aware of the use of the same tainted evidence?

Can the Court at one and the same time say that during the trial Mr. Stryker knew of the unconstitutional use of the illegally obtained evidence for the purpose of "waiving" his client's constitutional rights but that he did not know of it during the trial for the purpose of supporting his "suspicions" about the use of that evidence before the 1953 grand jury?

We respectfully submit that it is not due process, when a man's liberty is at stake, to utilize mutually contradictory assumptions of fact in the decisional process and to conclude that there is an absence of reversible error.

E. The Government never argued the theory of waiver which the Court adopted.

This Court's basis for imputing to Mr. Stryker an intent to lift the bar of Lawn's constantly reiterated constitutional objection to the use of tainted documents was not suggested, argued or briefed by either counsel; indeed something entirely different was claimed by the Solicitor General.

The Solicitor General's premise was utterly at odds with ascribing to Mr. Stryker a purpose to make a jury argument by conscious use of outlawed evidence. The Solicitor General argued:

> "Accordingly, the only credible explanation of Lawn's consent to the admission in evidence of Exhibits 61 A and 61 B is that he agreed with the Government that these exhibits were not covered by the return order" (Govt. Br. No. 9, p. 17).

This Court implicitly has found that the exhibits were covered by Judge Goddard's return order and there is no legal substance to this hypothesis of the Solicitor General. Significantly however, the explanation of the Solicitor General accepts and proceeds on the notion that Mr. Stryker was unaware of the tainted character of the proof.

If the Government had argued the theory of waiver which the Court adopted, the petitioner would have pointed out to the Court that Lawn's constitutional rights were already

violated by the use on the trial of the check and the stub before the papers were ever offered in evidence, and surely no waiver of such use is imputable to Mr. Stryker.

Illegal use of the outlawed evidence was made by the Government on the direct examination of its witness, Roth (R. 1021). The prosecutor placed the tainted check and stub in Roth's hands, *before they were offered in evidence at all*, and presumably before they were exhibited to Mr. Stryker, and elicited through the witness every material detail of the check and stub, connected the same with the testimony on "Mr. Lawn's legal fee," and only then, offered the documents in evidence as Exhibits 61A-B, and presumably then showed them to his adversary.[1]

At this point in the trial, the Government had fully used evidence which had been outlawed by Judge Goddard who had directed the return of and outlawed this evidence. The Government legally had no excuse to make use of the tainted papers and the conviction stands on a tainted record.

As matter of law, Mr. Stryker, by the pretrial motions, is deemed to have objected to this constitutional invasion and Lawn's constitutional objection was secure for all purposes

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[1] "By Mr. Wessel:

"Q. Mr. Roth, I show you Exhibits 61-A and B for identification and ask you if you can tell me what those two are? A. 61-A is a check drawn on the account of Tavern Fruit Juice Company by William Gigho and signed by Frank Livorsi, to Howard Lawn, endorsed by Howard M. Lawn. 61-B is the stub of a checkbook—there are three names on it. The bottom one is Howard Lawn, $15,000, and in parenthesis 'Bill G.'

"Q. Sir, do you recognize the stub, which is 61-B, and the check, which is 61-A, is the $15,000 to which you referred a few minutes ago in connection with Mr. Lawn's legal fee? A. Yes, sir.

"Q. With regard to the check stub for check No. 640, the $15,000 check, can you tell me at what time the various entries on that check stub were made? A. The date the check was issued.

"Q. Is that true with regard to the parenthetical notation, 'Bill G.'? A. I do not know.

"Mr. Wessel: I offer in evidence Exhibits 61-A and B.

"Mr. Stryker: Just a question of two." (R. 1021)

After this evidence there followed the "Preliminary Questions by Mr. Stryker:" (R. 1022)

thereafter without requirement of any further articulation thereof. *Cogen* v. *United States*, 278 U. S. 221 (1929).

The waiver imputed by the Court relates to the second of the two uses of the tainted proof, i.e., the admission into evidence of Exhibits 61A-B. As matter of law there could be no waiver since the Government's oral use established the irremediable error. Mr. Stryker was entitled to try the remainder of the case without again renewing Lawn's objection which Judge Goddard had preserved. *Waldron* v. *United States*, 219 F. 2d 37, 41 (D. C. Cir. 1955); *United States* v. *Wheeler*, 149 F. Supp. 445, 447 (W. D. Pa. 1957).

The Court's opinion points to Judge Palmieri's admonition that Lawn could object on the trial if he had reason to believe that the Government was using tainted proof. The Court also refers to the legal rule where a pretrial motion to suppress is overruled and states that it is unnecessary again to object on the trial, subject to exceptions (none of which ever favor the Government). However, there are no exceptions to the legal rule where as here the motion to outlaw and return has been granted and not merely deferred to the trial.

The Court's construction completely overlooks that Judge Goddard's ruling outlawing Exhibits 61A-B became a controlling rule in the case just as did a ruling made during the trial, and necessarily determined the conduct of the trial. *Cogen* v. *U. S.*, 278 U. S. 221, 223 (1929).

After Judge Goddard's ruling it was unnecessary for Lawn to reiterate his position once considered and decided. Lawn was not required again to articulate his constitutional objection to preserve this bar against the evidence. *Greco* v. *Reading Co.*, 183 F. 2d 716 (3 Cir. 1950); *Morgan* v. *Pennsylvania R. Co.*, 166 F. 2d 543 (3 Cir. 1948). Mr. Stryker could only lift the bar to Exhibits 61A-B by unequivocally consenting to the nullification of Judge Goddard's order. A vested bar is not lifted by equivocal conduct. "The force and vitality of judicial decrees derive from more robust sanctions." *McComb* v. *Jacksonville Paper Co.*, 336 U. S. 187, 191 (1949).

F. The imputed waiver is contradicted by all of Mr. Stryker's efforts to preserve the defendant's constitutional rights throughout the trial.

That Mr. Stryker had no intent to surrender any of Lawn's constitutional rights appears plainly and frequently throughout the record. We offer the following examples: He said: "I want to * * * make sure that I don't overlook any constitutional rights that are involved" (R. 1355).

And again the record discloses:

> "The Court: * * * is there anything in this trial before this jury that has been improperly obtained? * * *.
>
> Mr. Stryker: The point was really that we were not able to find out whether those things were improperly obtained or not." (R. 2077)

In sum, the purpose imputed to Mr. Stryker does not stand analysis of its implications, and it is contradicted by the record.

Further, the use of the tainted evidence was irremediable error. The tainted evidence had been used even before the use thereof as an exhibit in evidence. Lawn was protected against all use by Judge Goddard's order sustaining his objection to this evidence, not overruling or deferring it to the trial.

Further, Mr. Stryker made no use either of the oral proof or of the documents so adduced by the Government—no use in any way. He did not cross-examine Roth on the substance or purpose of the payment either on preliminary or general cross-examination and he made no mention of the oral testimony or the check or its purposes on summation.

Mr. Stryker is not reasonably chargeable with having lifted the constitutional and judicial bars to the use on the trial of the tainted evidence.

II.

This Court has ruled that the prosecutor in summation did not go outside the record to bolster his case against the defendants, relying on the thesis that the prosecutor's statement that "We vouch for them (Roth and Lubben) because we think they are telling the truth" was in "reply" to Mr. Stryker's summation. In fact, Mr. Stryker's "summation" did not contain the remarks attributed to him by the Court in footnote 15 of its opinion. The material referred to was remarks of Mr. Stryker in his "opening" to the jury (R. 2901-5)—remarks which had been made some seven weeks prior to the prosecutor's summation—hardly likely to have incited the misconduct of the prosecutor which the Court has condoned. The brief of the Solicitor General led the Court into this error. (Br. No. 9, pp. 53-4).

On this matter we wish on this application only to make a single suggestion, that prior to the decision herein experienced and impartial trial lawyers had little or no reason to believe from any previously decided cases, or from any bar committee's analysis of the ethical question involved, or from any authoritative text writer, that a prosecuting official was privileged, whether on testimony of witnesses given before the jury or even on being goaded by an adversary, to "vouch" for his own witnesses "because we believe they are telling the truth."

The innovation introduced into the federal law by the decision herein merits further examination of its implication and desirability as a standard of Government conduct especially since on standards of state courts no such conduct of a prosecutor is tolerated. See state court cases, petitioner's main brief, N. 9, ftn. 21.

WHEREFORE, petitioner prays for a rehearing of this Court's decision of January 13, 1958.

Respectfully submitted,

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Milton Pollack, counsel for petitioner, hereby certifies that the above application is made in good faith and not for the purpose of delay.

Dated: New York, N. Y., February 5, 1958.

MILTON POLLACK